

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of the)
Telecommunications Act of 1996)

CC Docket No. 96-238

Amendment of Rules Governing)
Procedures to Be Followed When Formal)
Complaints Are Filed Against Common)
Carriers)

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COMMENTS OF U S WEST, INC.

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January 6, 1997

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SUMMARY

In these comments U S WEST, Inc. ("U S WEST") agrees with several of the Federal Communications Commission's ("Commission" or "FCC") suggestions to improve and expedite the formal complaint process, and provides several suggestions and observations relating to the issues raised.

First, U S WEST believes that the issues raised in the Notice of Proposed Rulemaking ("Notice") will be better dealt with by an advisory committee established pursuant to the Negotiated Rulemaking and Federal Advisory Committee Acts. The free exchange of views by representatives of the parties affected by the Commission's complaint procedures will more likely result in fair and prompt resolution of the issues identified by the Commission in its Notice. In addition, U S WEST encourages the Commission to foster the use of alternative dispute resolution procedures to resolve damages issues as well as liability issues and urges the Commission to give administrative law judges full authority to handle all complaints for damages.

Finally all complaints regarding private damages must be treated with the recognition that, ultimately, adjudication of private damages disputes is a judicial, not an administrative function, and that the FCC's rules cannot operate to deprive a defendant of its right to a judicial adjudication of a damages action.

With respect to particular proposals of the Commission, U S WEST supports the Commission's suggestion that parties be required to file more detailed complaints and answers. U S WEST, however, does not endorse replacing

important procedural rights with the use of such detailed pleadings. For instance, while U S WEST supports tight discovery timetables, U S WEST does not believe the Commission should unduly limit the scope of discovery in private damages actions. Rather, the Commission should strictly limit “fishing expeditions” with expedited staff rulings on discovery pleadings.

In addition to its proposal that a joint statement of stipulated facts and key legal issues be submitted within five days after the answer is filed, U S WEST suggests that the Commission also require a joint statement of key factual disputes, which will allow both the Commission and the parties to focus early on the relevant issues. U S WEST also supports adoption of a rule that requires parties to exchange all of their evidentiary exhibits in advance of the filing of briefs. It is critical to the adjudicatory process that the presentation of evidence be placed on the record and that there be an opportunity to rebut that evidence.

U S WEST does not support elimination of brief filing in cases where discovery is not conducted as the Commission proposes. The more detailed pleadings proposed by the Commission should not contain factual or legal arguments. In addition, the Commission should adopt the standard briefing procedure whereby the plaintiff's brief is followed by the defendant's brief, which is in turn followed by the plaintiff's reply brief.

With respect to status conferences, U S WEST suggests the Commission continue to liberally permit attendance by telephone and require parties to submit an agreed upon order following the conference.

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COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST") hereby submits its comments in the above captioned proceeding.

In its Notice in this proceeding, the Federal Communications Commission ("Commission" or "FCC") seeks comment on possible reforms to the formal complaint process currently governed by Subpart E of Part 1 of its rules (47 C.F.R. Sections 1.720-1.735 of the Commission's rules).¹ The Notice deals with expedited complaint timelines imposed on the Commission pursuant to several sections of the Telecommunications Act of 1996 ("Act"), but is not limited to new issues raised by the Act. Instead, the Notice views the Act's new requirements as an opportunity to

¹ In the Matter of Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 96-238, Notice of Proposed Rulemaking, FCC 96-460, rel. Nov. 27, 1996 (or "Notice").

completely review certain key complaint procedures and possibly to revise the entire complaint process. As a general proposition, the suggestions made in the Notice are good ones, and U S WEST agrees that the formal complaint process can greatly benefit from the overall approach set forth in the Notice. Based on its own experience as a participant in the formal complaint process, U S WEST sets forth herein a number of suggestions and observations on the matters raised in the Notice.

I. GENERAL OBSERVATIONS

Several general observations deal with the entirety of the Notice, and are discussed by way of introductory comments.

A. Negotiated Rulemaking

Having reviewed the Notice, it appears to U S WEST that revisions to the Commission's complaint processes might be better dealt with in an advisory group or other body comprised of representatives of the entire industry. Filing comments from U S WEST's perspective is unlikely to bring together the entirety of focus which an industry group could collect. In fact, in a forum-type environment, the free exchange of views could well result in an industry consensus not obtainable through the standard rulemaking process. U S WEST recommends that the Commission consider establishing an advisory committee pursuant to the Federal Advisory Committee Act² and the Negotiated Rulemaking Act³ as a proper

² 5 U.S.C. App. 2.

procedural vehicle for evaluating the issues raised in the Notice. Such a committee would ensure that the Commission's goal in this proceeding is met: the development of rules which facilitate the full, fair and prompt resolution of formal complaints.⁴

An agency may establish a committee to negotiate and develop proposed rules, if the agency determines that the use of the negotiations is in the public interest.⁵ Specifically, the agency must consider the following seven factors.

Whether:

- (1) there is need for a rule;
- (2) there is a limited number of identifiable interests that will be significantly affected by the rule;
- (3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who --
 - (a) can adequately represent the interests identified under paragraph (2); and
 - (b) are willing to negotiate in good faith to reach a consensus on the proposed rule;
- (4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;
- (5) the negotiated procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;
- (6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and

³ Pub. L. No. 101-648, Nov. 28, 1990 ("NRA").

⁴ See Notice ¶ 2.

⁵ 5 U.S.C. § 583.

(7) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.⁶

U S WEST believes that the seven selection criteria are applicable in this proceeding. First, the implementation of the provisions in the Telecommunications Act of 1996 relating to complaints and the Commission's issuance of a Notice of Proposed Rulemaking in this docket make it clear new rules are necessary.⁷

Second, there is a limited number of groups that will be affected by the new rules: potential defendant common carriers and complainants.⁸ Third, U S WEST is certain that a balanced mix of the two groups can come together in good faith and reach an agreement on rules which will benefit both defendants and complainants.

Fourth, a committee comprised of representatives for potential defendants and complainants will be able to reach a consensus within a fixed period of time set by the Commission. Fifth, such a committee will not unduly delay issuance of a final order.⁹

⁶ Id.

⁷ See Notice ¶ 1.

⁸ While each potentially affected individual defendant or complainant cannot possibly be represented, each *interest* can be adequately represented. That is, a representative from several of the various subsets of common carriers (e.g., local exchange carriers, interexchange carriers) and from several of the various subsets of potential complainants (e.g., consumer groups) could serve on the negotiating committee. We note that several carriers have interests as both potential defendants as well as potential complainants.

⁹ In cases in the past where the Commission has utilized a negotiated rulemaking process, the advisory committee has been established prior to issuance of the notice of proposed rulemaking. Here, where the Commission has already issued the notice, it is obviously impossible for a negotiating committee to delay issuance of a

Sixth, Commission resources needed to analyze the varied comments in this proceeding could be better and more efficiently devoted to the negotiating committee's use, including a neutral facilitator from the Commission. Finally, the Commission's willingness to use the consensus of a negotiated rulemaking committee as the basis for its rules is a matter of public record.¹⁰ The agency has used this process with great success in other proceedings inherent with conflicting interests.¹¹

By utilizing the negotiated rulemaking process, the Commission will allow affected parties to share information, ideas and perspectives, which will lead to the cooperative development of rules. This process will also increase the acceptability by interested parties and thus decrease the likelihood that affected parties will challenge the final rules in court. In short, interested party negotiations in this proceeding are appropriate. Fair regulations designed to facilitate and expedite

notice in violation of factor five of the NRA. Moreover, the Committee will have the benefit of the Commission's notice as well as related interested party comments and reply comments. A framework will have already been established for it, thus facilitating quick resolution of the issues.

¹⁰ See, e.g., Customer Satisfaction Report of the Common Carrier Bureau, Federal Communications Commission, 1996 FCC Lexis 5730 (August 1996) ("The Bureau is continuing to make efforts to facilitate greater use of [Alternate Dispute Resolution or "ADR"] and negotiated rulemaking techniques through changes in Commission rules for processing complaints").

¹¹ See generally, In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297 and In the Matter of Access to Telecommunications Equipment and Services by Persons with Disabilities, CC Docket No. 87-124.

complaint proceedings can clearly be developed on an expedited basis by those interests that will be particularly and significantly affected by those rules.

B. Alternate Dispute Resolution

The Notice asks whether alternate dispute resolution procedures might be a reasonable manner of resolving damages issues once carrier liability has been established.¹² U S WEST supports the use of ADR wherever possible and appropriate, and agrees with the proposal in the Notice. However, the proposal does not go nearly far enough. We submit that alternative dispute resolution procedures be used wherever possible to resolve entire complaints, including liability issues, not simply damages. The Administrative Disputes Resolution Act encourages the use of alternative dispute resolution techniques in administrative proceedings, including complaint proceedings.¹³ While the Commission routinely suggests to parties that they consider alternative dispute resolution techniques in complaint proceedings, these suggestions do not seem to have resulted in a substantial number of arbitrations in lieu of formal Commission complaint actions. The Commission could aid materially in the number of complaints handled via alternative dispute resolution processes by making it clear that it will permit enforcement of alternative dispute resolution clauses in carrier contracts and in carrier tariffs. U S WEST recommends that the Commission take such action.

¹² Notice ¶ 67.

¹³ Pub. L. No. 552, 101st Cong., 2d Sess., Nov. 15, 1990.

C. Administrative Law Judges

The Notice also suggests a variety of situations in which administrative law judges ("ALJ") might be utilized in formal complaint proceedings.¹⁴ U S WEST submits that this proposal, while salutary in itself, does not go far enough in recognizing the benefits which an ALJ could bring to a contested complaint proceeding -- particularly one for private damages -- from the very outset of the process. One of the prime difficulties which U S WEST has had with the existing system of private damage complaints under Section 208 is the fact that the dual role seemingly played by the Commission's staff has made it difficult to obtain an objective evaluation of private damage disputes. This is because the staff is charged with carrying out Commission policy, and is precluded by rule from exceeding the authority delegated to it in Sections 0.91 and 0.291 of the Commission's rules.

This position is entirely appropriate in cases involving prospective relief or other cases involving non-monetary relief under the Commission's complaint rules. However, a complaint seeking monetary damages paid by one private party to another private party is an entirely different matter. Complaint proceedings for private damages are adjudicatory in nature -- and indeed cannot constitutionally be relegated entirely to a federal agency which is not properly characterizable as an

¹⁴ Notice ¶¶ 68 (damages), 56 (insoluble factual disputes).

Article III Court.¹⁵ Commission orders for the payment of private damages are not self executing -- and indeed provide only prima facie evidence of the facts found in such orders whenever a successful complainant seeks to enforce them.¹⁶ In fact, we submit that, despite the provisions for damages in Section 206 of the Act, FCC adjudication of private damages complaints is constitutionally suspect.

In this context, it seems particularly appropriate that damages complaints be handled via an ALJ. The Commission's policy positions could be represented by the staff as an advocate before the ALJ, but the staff's recommendation would not be binding on the ALJ. Of course, decisions of the ALJ would be reviewed by the entire Commission.¹⁷

Moreover, once an ALJ was designated to adjudicate a particular complaint, there is no reason why this judge should not be given full discretion to control the proceedings. This would include discovery, briefing schedules, proof burdens and all of the matters which a judge in an Article III context normally acts upon in the ordinary course of a judicial proceeding. An ALJ could be given the time frame within which a particular matter needed to be adjudicated, but would be free to devise his or her own schedule within that time frame to fit the circumstances of a particular case. Simply stated, use of an ALJ could eliminate much of the detailed

¹⁵ Northern Pipeline Construction Co. v. Marathon Pipe Line Company and United States, 459 U.S. 1094 (1982).

¹⁶ See 47 U.S.C. § 407; Interstate Commerce Commission v. Atlantic Coast Line R. Co., 383 U.S. 576 (1966).

¹⁷ 47 C.F.R. § 1.115.

procedures set forth in the Notice. This would hold true in all cases, not just those in which the dispute was a private damages complaint.

Accordingly, U S WEST recommends that the Commission make maximum use of ALJs in all FCC complaint proceedings, and that these judges be given the normal authority over the course of a particular proceeding exercised by Article III judges. While of immediate importance in regard to complaints for private damages, this approach to complaints could prove beneficial to all complaint proceedings.

II. CONTENTS OF COMPLAINTS AND REPLIES

The Notice proposes to dramatically expand the scope of information required to be placed in complaints and replies to complaints. Specifically the Notice proposes that a complaining party submit the name and location of all individuals having discoverable information about the complaint, the identity (or possibly copies) of relevant documents¹⁸ and specific information on how the defendant is alleged to have violated the Communications Act or the Commission's rules.¹⁹ Answers must provide similar information. If the complaint is for damages, the complaint must also provide a detailed damages calculation.²⁰

These rules generally appear salutary. Detailed complaint and answer filings will help crystallize the issues more quickly. However, the Commission must

¹⁸ Notice ¶ 43.

¹⁹ Id. ¶¶ 40-41.

²⁰ Id. ¶ 66.

be careful not to take this notion too far. In many complaints, the complaining party will not have all of the facts necessary to prove its case when the complaint is initially filed. Similarly, the defendant will not always be able to devise its complete defense based only on the complaint, no matter how detailed. Indeed, the Notice seems to recognize this fact by requiring identification of relevant people and documents in the complaint. We submit that, even with the detailed complaint and answer described in the Notice, it is unlikely that either party to a complaint proceeding will be entirely ready to rest its case solely on the pleadings. Thus, U S WEST does not support the use of detailed pleadings as a vehicle for cutting off other important procedural rights. Some of these rights are discussed below.

III. DISCOVERY

The Notice proposes a variety of mechanisms to limit discovery abuses.²¹ U S WEST is very concerned that the Commission not unduly limit the scope of discovery in private damages cases. Doing so simply increases the probability that any decision the Commission reaches in such a case will be totally relitigated when a Section 407 collection action is undertaken. Thus, while U S WEST agrees that tight discovery timetables are appropriate, it would not be reasonable to further limit the scope of discovery. Instead, strict limits on fishing expeditions during the discovery process (i.e., insistence that only relevant information be produced in discovery), enforced by expedited rulings by the staff on discovery pleadings, could serve well to avoid discovery controversies.

²¹ Id. ¶¶ 48-56.

In addition, the more detailed pleadings contemplated by the Notice could be used as a vehicle to expedite discovery without limiting it at all. The Commission could require that all documents identified in a complaint or an answer be made reasonably available to the other side (which seems considerably more efficient than requiring that they be filed with the Commission). The Commission could also direct that all people identified in the complaint or answer be made subject to immediate interrogatories or deposition. The defendant could commence discovery before answering the complaint. This discovery vehicle could aid the parties in perfecting their factual cases without burdening the staff with discovery quarrels at all.

However the Commission chooses to deal with expediting discovery, we submit that eliminating self-executing discovery is not a good idea and should be rejected.

IV. BRIEFS

The Notice seeks comment on the briefing process, focusing on timetables for submission of briefs and the use of stipulations of fact and legal issues to simplify dispute resolution.²²

The suggestion in the Notice that a joint statement of stipulated facts and key legal issues be submitted within five days after the answer is filed is a meritorious one, although it may prove in practice that this timetable is too short.

²² Id. ¶¶ 80-83.

U S WEST suggests that the Commission consider also requiring a joint statement of key factual disputes to be filed by the parties. Such a joint statement would enable the parties and the Commission to focus early on key factual issues which, in turn, should enable all parties to determine the extent to which discovery is necessary (or the extent to which a party needs to provide factual support for a particular contention or position).

The proposal in the Notice²³ that the filing of briefs be prohibited when discovery is not conducted is not a good one. Even under the more detailed pleading rules proposed in the Notice, a complaint and an answer should set forth the positions of the parties, but not argue why those positions are legally or factually correct (particularly in the face of adverse evidence which would not, in the case of a defendant's filing, be available to the complainant until after its complaint had been filed).

In fact, both the current rules and the proposed revisions can be read to leave out a critical step in any adjudicatory process -- the presentation of evidence on the record with an opportunity to rebut that evidence. In the past the staff has dealt with this difficulty by requiring parties to exchange all of their evidentiary exhibits in advance of the filing of briefs. U S WEST recommends that the Commission adopt such a procedure. In this manner, factual materials which not only advance the party's position but rebut the position of the adverse party can be presented to the decision-maker in a meaningful fashion without surprise to the adverse party.

²³ Id. ¶ 81.

We assume that the requirement for stipulations of facts and key legal issues discussed above should make such an evidentiary exchange fairly simple.

Nevertheless, provision should be made for any party to make a supplemental factual submission (limited to rebuttal of facts in the original submissions) a week after the original exchange of evidence. In this manner, briefs can be submitted which are directly supported by the evidence which each party finds most persuasive, and which has been made available to the other party for purposes of rebuttal.

U S WEST agrees with the Notice that it may be necessary, in some cases, to shorten the time allotted for submission of briefs and reply briefs. However, U S WEST does not favor the current system whereby complainants and defendants file simultaneous initial and reply briefs. This generally puts defendants in the position of replying to a position not yet fully articulated. Defendants then must set forth most of their specific defenses in their own reply briefs, to which complainants have no reply opportunity. Even under the proposed revisions to the rules (which will ensure that both parties are more aware of the specifics of each others' cases well in advance of briefing), such a situation is sub-optimal. The best briefing approach is the standard one -- a single complainant's brief, followed by a single defendant's brief, followed by a single complainant's reply brief. If a defendant wishes to raise legal or jurisdictional issues on which it has the burden of proof, it can follow the same schedule on those particular issues. U S WEST was recently

involved in a complaint proceeding in which this briefing procedure was used, and, at least from the standpoint of the parties, it was found to be quite satisfactory.²⁴

V. CROSS-COMPLAINTS AND COUNTERCLAIMS

The Notice suggests that various rules mirroring the Federal Rules of Civil Procedure be adopted regarding cross-complaints and counterclaims, most significantly proposing that what the Notice calls "compulsory counterclaims," be barred if not raised in response to an initial complaint.²⁵ Under normal circumstances, U S WEST would agree with these recommendations.

Unfortunately, the D.C. Circuit Court of Appeals has almost completely eviscerated any ability this Commission might have to hear any counterclaim, not to mention the ability to bar further prosecution of compulsory counterclaims in future proceedings.²⁶ In MCI, the Court ruled that the Commission was completely without jurisdiction to hear counterclaims concerning "underearnings" in resolving complaints regarding "overearnings." There is frankly no more compulsory counterclaim than that which the Court ruled the Commission to lack jurisdiction -- indeed, such counterclaims resemble "counterclaims in recoupment" which normally can be brought only as counterclaims. The Court left defendants to litigate even such clearly compulsory counterclaims solely as defenses to actions to collect FCC ordered damages under Section 407. While U S WEST finds this situation

²⁴ See Enhanced TeleManagement, Inc. v. US West Communications, Inc., E-96-23.

²⁵ Notice ¶¶ 70-71.

²⁶ MCI Telecommunications Corp. v. FCC, 59 F.3d 1407 (D.C. Cir. 1995) ("MCI").

unfortunate, it seems clear that the Commission cannot bar future recovery of “compulsory counterclaims” over which it has no jurisdiction.

VI. STATUS CONFERENCES

The Notice proposes that status conferences take place in all cases ten business days after the filing of the answer, and makes a variety of suggestions on what might be accomplished at such conferences and how they might be run.²⁷

U S WEST as a general matter agrees with these suggestions. Status conferences can prove quite useful in focusing parties to a complaint on the key factual and legal issues, particularly when FCC staff attendees are able to keep the parties from undue posturing. We have several suggestions.

First, the Commission’s staff has recently adopted a liberal policy for permitting attendance at status conferences by telephone. As the U S WEST legal department is located in Denver, telephone attendance at complaint status conferences has been especially beneficial. We have found that telephone attendance does not impact on our ability to participate meaningfully in such conferences. U S WEST recommends that the Commission continue this policy on telephone attendance at status conferences. Of course, in those instances where personal attendance is deemed necessary or particularly useful, such attendance can be arranged. However, the presumption should be that telephone attendance will suffice.

²⁷ Notice ¶¶ 57-59.

Second, the Notice proposes that formalization of oral rulings at conferences be treated via stipulated written orders by the parties, or that the parties memorialize such orders by retaining the services of a stenographer. Both of these ideas have merit -- while the staff has been reducing key orders to writing in recent proceedings, one frequent frustration in earlier complaint proceedings was the lack of written orders arising out of status conferences. The recent orders issued by the staff have been eminently satisfactory. However, there is no reason why the parties to FCC complaint proceedings should not follow the standard federal practice of having the parties prepare an agreed upon order following a status conference. In addition, while the ability of the parties (or either party) to utilize the services of a court reporter to obtain a transcript of status conference is important (and should be formalized), there is no reason why the presence of such a court reporter ought, at least in all instances, to eliminate the need for a written order reflecting rulings by the staff at a conference. The mutual understanding of the parties of an oral staff order can often best be reflected in an order submitted by stipulation even if a court reporter captured the exact words of the staff official making the ruling.

VII. CEASE AND DESIST ORDERS

The Notice proposes that cease and desist orders and other interim relief be granted based on the four part test of Virginia Petroleum Jobbers Association v. FPC.²⁸ U S WEST agrees. This test is difficult to meet, and deliberately so, because it necessarily entails requiring a party to modify its conduct prior to actual

²⁸ 259 F.2d 921 (D.C. Cir. 1958).

adjudication of the actual merits of a complaint. As such, interim relief should be granted sparingly, particularly in cases involving private parties. The expedited procedures proposed in the Notice should generally obviate the need for interim relief -- if final relief is timely, interim relief can often be unnecessary.

VIII. SANCTIONS

The Notice seeks comment on the types of sanctions which might be available to enforce the Commission's procedural complaint rules, recognizing that the most common judicial sanction -- award of attorneys fees -- is not lawfully available to the Commission.²⁹ As a general matter, U S WEST has not witnessed much in the way of explicit violations of the Commission's rules in complaint proceedings. Problems do arise in the case of over-broad discovery requests and evasive interrogatory answers. Such issues can best be handled through quick and decisive rulings on discovery matters, not sanctions.


If a party really does violate the Commission's complaint proceeding rules, we submit that proper sanctions should be related to the nature of the offense and should focus on the processing of the complaint. For example, a rule violation concerning discovery and a particular issue could result in a ruling deciding the issue contrary to the position of the violating party. These types of sanctions would

²⁹ Notice ¶¶ 84-85.

normally cure the ill effects of any rule violation.. Forfeitures under Section 503(b) of the Communications Act should be reserved for truly egregious violations.³⁰

Respectfully submitted,

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³⁰ Actually, the requirement of the statute that any violation be "willful or repeated" should ensure that forfeitures are only imposed in egregious cases. 47 U.S.C. § 503(b).

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 6th day of January, 1997,
I have caused a copy of the foregoing **COMMENTS OF U S WEST, INC.** to be
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